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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JERRY NEHL BOYLAN,

Defendant.

Case No. 22-cr-00482-GW

**MOTION TO STRIKE AND FOR
CURATIVE INSTRUCTION
REGARDING IMPROPER
TESTIMONY OF GOVERNMENT
WITNESS BRIAN PRIDDIN**

October 30, 2023 at 9:30 a.m.

The Honorable George H. Wu

Jerry Nehl Boylan, through his attorneys of record, Deputy Federal Public Defenders Georgina Wakefield, Gabriela Rivera, Julia Deixler, and Joshua D. Weiss hereby moves this Honorable Court for an order to strike improper testimony by government witness Brian Priddin that was elicited in direct violation of the Court's prior order to exclude testimony under Rule 404(b), and a curative instruction regarding the improper and misleading testimony.

This motion is based upon the attached memorandum of points and authorities, all files and records in this case, and such evidence and argument as may be presented at the hearing on the motion.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: October 30, 2023

By /s/ Georgina Wakefield

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I. INTRODUCTION & FACTUAL BACKGROUND

In advance of trial, the government moved under Federal Rule of Evidence 404(b) to introduce evidence at trial that Jerry Boylan “improperly dumped human waste into the ocean.” Dkt. 115 at 10. At the pretrial conference held on October 12, 2023, the Court correctly and unequivocally ruled to exclude such evidence as irrelevant and inadmissible under Rule 403. *See* Tr. of Under Seal Hrg. (Oct. 12, 2023) at 13:07-11. The witness through which the government sought to admit the evidence of improper sewage disposal was Brian Priddin, the last witness called to testify during last Friday’s trial proceedings. Mr. Priddin stated in an interview with the NTSB that he quit his position at Truth Aquatics because he had observed “they were dumping raw sewage within that marine area.” Ex. A at 9. Mr. Priddin felt that Mr. Boylan knew what the Coast Guard required him to do, but chose to disregard it. *Id.* Mr. Priddin also told investigators that because of this sewage issue, he said, “I don’t want to risk my license because this is wrong and I don’t agree with it.” *Id.* Based on the Court’s October 12 ruling, none of this evidence was admissible at trial.

On Friday, the government violated the Court’s clear ruling by eliciting testimony related to this issue but omitting any specific reference to sewage dumping. Government counsel asked Mr. Priddin why he quit his job at Truth Aquatics. Over defense counsel’s objections, Mr. Priddin testified,

“I felt I was putting my captain’s license in jeopardy[.] There were times when the defendant stated to me, I know that this is what the Coast Guard would want you to do . . . That’s what he told me . . . So the defendant told me directly, I know that’s what the Coast Guard would want you to do, but I want you to do this. And I felt that the things that he was asking me to do could cost me my captain’s license.”

Ex. B (Partial Tr. Oct. 27, 2023) at 103:15-07. Based on his prior recorded statements, defense counsel was aware that Mr. Priddin was referring specifically to his

1 conversations with Mr. Boylan regarding sewage disposal. Defense counsel
2 immediately requested a sidebar to address this issue, which the Court denied. *Id.* at
3 104:06-07. Mr. Priddin continued his testimony to state that the second reason he quit
4 his job with Truth Aquatics was that he “did not feel safe.” *Id.* at 104:10-11. The
5 government then concluded its direct examination, leaving this as the last line of
6 testimony heard by the jury before breaking for the weekend.

7 The Court must strike Mr. Priddin’s testimony regarding the reasons he quit his
8 job at Truth Aquatics because it directly violated the Court’s prior order and is unduly
9 prejudicial and misleading. Without explicitly stating that he was referring to the issue
10 of sewage dumping, Mr. Priddin testified to the precise issue that was subject to the
11 Court’s order. There is no other issue that Mr. Priddin has ever stated he brought to
12 Mr. Boylan’s attention and was instructed to violate despite Coast Guard rules. There
13 is no other issue that Mr. Priddin has ever stated caused him to fear he would lose his
14 captain’s license. Yet Mr. Priddin’s testimony on these points came after a long
15 discussion regarding roving patrol requirements; a core issue in this case.¹ *See, e.g., id.*
16 at 96:16-19 (“Q: Is that unusual, in your experience? A: That is. I have never been on
17 another vessel where we were either an anchor or underway at night and not have
18 somebody awake, have an anchor watch, or roving night watch”); *see also id.* at 96:20-
19 25 (testifying as to why a “roving night watch is important”); *id.* at 97:01-11 (testifying
20 again that he “never experienced another vessel that did not have a watch at night”).

21 In eliciting testimony from Mr. Priddin about why he quit Truth Aquatics, the
22 government did not just circumvent the Court’s prior order; it also knowingly left the
23 jury with the false impression that Mr. Priddin’s testimony related to a roving patrol
24 requirement or other safety-related issue, rather than a completely irrelevant regulation
25 regarding sewage disposal. This impression, in turn, creates the false impression that
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27 ¹ As the Court acknowledged at sidebar, the government posed several questions
28 to Mr. Priddin seeking expert testimony, despite the fact that he was called to testify as
a percipient witness and was never noticed as an expert. *See Ex. B.* at 101:23-102:12.

1 Mr. Boylan told Mr. Priddin that he knew that he was violating Coast Guard regulations
2 with respect to roving patrol and knowingly disobeyed it. It is harder to imagine a
3 more prejudicial false impression that could be created in this gross negligence case, in
4 which the government is arguing that Mr. Boylan knowingly and recklessly disregarded
5 roving patrol requirements, which caused the decedents' deaths. The government's
6 failure to correct Mr. Priddin's misleading testimony and its violation of the Court's
7 order are grounds to strike the testimony from the record and admonish the government
8 in the presence of the jury.

9 The particular problem with Mr. Priddin's misleading testimony, as the
10 government is well aware, is that the defense cannot simply correct the jury's
11 impression on cross-examination. To do so would require the defense to reveal highly
12 prejudicial, irrelevant, and lurid facts that the Court unequivocally ruled had no place in
13 this trial. A curative instruction is therefore also necessary to correct the jury's likely
14 misimpression of the meaning of Mr. Priddin's testimony.

16 II. LEGAL FRAMEWORK

17 The prosecution's failure to correct misleading testimony violates a defendant's
18 right to due process, even where the testimony is not clearly false. *See Alcorta v.*
19 *Texas*, 355 U.S. 28, 31 (1957) (government may not permit witness to give a material
20 false impression of the evidence). In *Alcorta*, the Supreme Court recognized that the
21 prosecutor had knowingly fostered a false impression in his examination of a key
22 prosecution witness. The Court reversed the conviction and ordered a new trial because
23 the witness conveyed a false impression, despite the fact that the testimony was not
24 clearly false. The misleading testimony strengthened the prosecution case, and more
25 truthful testimony would have corroborated the defendant's claim of sudden passion
26 and also impeached the witness's credibility. The Court determined that the question
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1 was not whether the testimony elicited was actually false but whether the “testimony,
2 taken as a whole, gave the jury [a] false impression.”). *Id.*

3 Similarly, in *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995), the Court
4 reversed a conviction and ordered a new trial where the prosecutor used cross-
5 examination to create a false impression and declined to call the witness who would
6 have provided contrary information. Specifically, the prosecutor cross-examined a
7 defendant in a drug distribution case who claimed that there was another box of
8 narcotics nearby in the hotel in which he was arrested. *Id.* at 11108. Based on the
9 information known to the prosecutor at the time, he vigorously cross-examined the
10 defendant to assert that there was only one seizure of narcotics in the hotel. *Id.* Later,
11 the prosecutor learned through the case agent that there was in fact another seizure of
12 narcotics. But the government did not call the case agent in rebuttal to correct the false
13 impression created during the cross-examination of the defendant. The Eleventh
14 Circuit reversed the conviction and ordered a new trial. *Id.* Although the case did not
15 “deal with false testimony,” the prosecutor’s “implicit factual representations to the
16 jury” still rose to the level of misconduct and “corruption of the truth-seeking
17 function.” *Id.* at 1110; *see also Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (the
18 government “violates a criminal defendant’s right to due process of law when, although
19 not soliciting false evidence, it allows false evidence to go uncorrected when it
20 appears”).

21 When improper or unduly prejudicial evidence is admitted at trial, ordinarily the
22 proper remedy is to strike the evidence and instruct the jury to disregard it. *Lewis v.*
23 *United States*, 74 F.2d 173, 179 (9th Cir. 1934). “There are, however, instances in
24 which evidence is so prejudicial that even the instruction of the court to the jury to
25 disregard the same may be considered insufficient to correct the error.” *Id.* In such
26 cases, a mistrial may be appropriate. Here, the defense seeks a limiting instruction that
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1 corrects the misimpression created by Mr. Priddin's testimony and advises the jury of
2 the reason for the Court's order to strike.

3 4 III.ARGUMENT

5 A. The Court Should Strike the Improper Portions of Mr. Priddin's 6 Testimony and Provide a Curative Instruction to Remedy the 7 Misleading Nature of Mr. Priddin's Testimony.

8 As in *Alcorta* and *Alzate*, the government has knowingly created a false
9 impression through Mr. Priddin's testimony. This false impression is one that the
10 defense cannot adequately correct through cross-examination without getting into
11 details of highly prejudicial and irrelevant information that is likely to inflame the jury.
12 The proper remedy is therefore an instruction by the Court that corrects the false
13 impression created by Mr. Priddin's testimony without revealing the details of the
14 excluded evidence. The Court must also advise the jury of the government's bad faith
15 in eliciting this testimony. If the Court does not inform the jury that the testimony is
16 being stricken because it violated a prior order, the jury may be left to wonder the
17 significance of the Court's order to strike and pay outsized attention to the testimony.
18 To that end, the defense requests that the Court provide the following instruction before
19 Mr. Priddin resumes his testimony:

20 On Friday, you heard testimony that Brian Priddin quit Truth Aquatics because
21 he believed Mr. Boylan was violating Coast Guard regulations and that he felt
22 his captain's license was at risk. That testimony was misleading because it
23 implied that Mr. Priddin quit because of a roving patrol requirement or some
24 other safety issue. In fact, Mr. Priddin's testimony on this matter was regarding
25 an unrelated sanitary issue. The government violated a previous order by the
26 Court in eliciting such testimony. The testimony is to be stricken from the
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1 record, and you are ordered to disregard it. You may not consider the testimony
2 at any point during your deliberations in this case.

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4 **IV. CONCLUSION**

5 For the foregoing reasons, the defense respectfully requests that the Court strike
6 the testimony appearing in lines 103:15-104:05 of the transcript of Friday's
7 proceedings and provide a curative jury instruction to correct the jury's misimpression
8 and inform the jury of the government's bad faith in eliciting such testimony.

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10 Respectfully submitted,

11 CUAUHTEMOC ORTEGA
12 Federal Public Defender

13 DATED: October 30, 2023

14 By /s/ Georgina Wakefield

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